MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,
Petitioner,

-v.-

CHESTER J. DOMBROWSKI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

ROBERT W. WARREN
Attorney General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Attorneys for Petitioner

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

January 23, 1973

INDEX AND SYNOPSIS OF ARGUMENT

Page

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. **The Findings And Conclusions Of The Court Below That Weiss Was Searching The Thunderbird For Incriminating Evidence Of Other Offenses And That Mauer "Took Up" The Piece Of Bloodied Mat And White Sock From The Dodge After The Search Warrant Was *Functus Officio* Are Not Supported By The Record** 11

A. *Officer Weiss was not searching for incriminating evidence of other crimes* 11

B. *The search warrant for the Dodge was not functus officio when Mauer "took up" the mat and sock* 17

II. **Officer Weiss Did Not Conduct A "Search" Of The Thunderbird Within The Meaning Of The Fourth Amendment** 20

III. **If There Was A "Search," It Was Reasonable Within The Meaning Of The Fourth Amendment** 27

Page

IV. The 1960 Dodge Was Impounded As Evidence Under Authority Of Search Warrant 29

V. The Exclusionary Rule Should Be Modified 33

A. Historical background 33

B. The rule in practice 35

C. Failure of the rule 39

D. Modification of the rule is justified 41

E. The rule should be applied to substantial, flagrant situations only 43

CONCLUSION 47

CERTIFICATE OF SERVICE 49

CASES CITED

Berenyi v. District Director, Immigration and Naturalization Service (1967), 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed. 2d 656 16

Bivens v. Six Unknown Named Agents (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619 ..... 44, 45

Boyd v. United States (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 ..... 34, 37

Cabbler v. Virginia (1971), 212 Va. 520, 184 S.E. 2d 781, cert. den. 405 U.S. 1073, 92 S.Ct. 1501, 31 L.Ed. 2d 807 25

Camara v. Municipal Court (1967), 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed. 2d 930 46

Page

Cataphote Corp. v. De Soto Chemical Coatings, Inc. (9th Cir., 1966), 356 F. 2d 24, cert. den. 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed. 2d 67 19

Chambers v. Maroney (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 21

Coolidge v. New Hampshire (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 ..... 22, 24, 25, 26, 27, 29, 31, 32, 36

Cooper v. California (1967), 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730 31

DiMarco v. Greene (6th Cir., 1967), 385 F. 2d 556 28

Dombrowski v. Cady (E.D. Wis., 1970), 319 F. Supp. 530 1

Dombrowski v. Cady (7th Cir., 1972), 11 Cr. L. 2289 1

Dombrowski v. Pfister (1965), 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22 ..... 46, 47

Elkins v. United States (1960), 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669 ..... 38, 45

Fiske v. State of Kansas (1927), 274 U.S. 380, 47 S.Ct. 655, 17 L.Ed. 1108 16

Frazier v. Cupp (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684 21

Page

Graver Tank and Mfg. Co. v. Linde Air Prod. Co. (1948), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672 16

Guzick v. Drebus (6th Cir., 1970), 431 F. 2d 594, cert. den. 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed. 2d 231 19

Haerr v. United States (5th Cir., 1957), 240 F. 2d 533 20

Harris v. United States (D.C. Cir., 1966), 370 F. 2d 477 23

Harris v. United States (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067 ..... 22, 23, 24, 25, 26, 28

Hoffa v. United States (1966), 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374 16

Irvine v. California (1954), 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561 45

Linkletter v. Walker (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 ..... 38, 39

Mapp v. Ohio (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 45

Marshall v. United States (5th Cir., 1970), 422 F. 2d 185 28

McNabb v. United States (1943), 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 45

Page

Mills v. Maryland (1971),
12 Md.App. 449, 279 A. 2d 473,
cert. den. 406 U.S. 967, 92 S.Ct.
2411, 32 L.Ed. 2d 666 18

Napue v. People of State of Illinois (1959),
360 U.S. 264, 79 S.Ct. 1173,
3 L.Ed. 2d 1217 16

North v. Superior Court, 11/16/72,
12 Cr.L. 2232 24

People v. Defore (1926),
242 N.Y. 13, 150 N.E. 585 35

Preston v. United States (1964),
376 U.S. 364, 84 S.Ct. 881,
11 L.Ed. 2d 777 ..... 8, 10, 22, 23

Rose v. United States (6th Cir., 1921),
274 F. 245, cert. den. 257 U.S. 655,
42 S.Ct. 97, 66 L.Ed. 419 19

Speyer, Inc. v. Humble Oil and Refining
Co. (3rd Cir., 1968), 403 F. 2d 766,
cert. den. 394 U.S. 1015, 89 S.Ct.
1634, 23 L.Ed. 2d 41 19

State v. Dombrowski (1969),
44 Wis. 2d 486, 171 N.W. 2d 349 ..... 4, 15

Tehan v. United States ex rel. Shott (1966),
382 U.S. 406, 86 S.Ct. 459,
15 L.Ed. 2d 453 38

Terry v. Ohio (1968),
392 U.S. 1, 88 S.Ct. 1868,
20 L.Ed. 2d 889 39

Page

United States v. Blackburn (6th Cir., 1968),
389 F. 2d 93 28

United States v. Graham (6th Cir., 1968),
391 F. 2d 439, cert. den. 393 U.S. 941,
89 S.Ct. 307, 21 L.Ed. 2d 278 28

United States v. Iacullo (7th Cir., 1955),
226 F. 2d 788, cert. den. 350 U.S. 966,
76 S.Ct. 435, 100 L.Ed. 839 17

United States v. Moore (6th Cir., 1971),
452 F. 2d 569, cert. den. — U.S.—,
92 S.Ct. 2435, 32 L.Ed. 2d 684 18

United States v. Ragsdale (5th Cir., 11/10/72),
12 Cr.L. 2218 43

Vauss v. United States (D.C. Cir., 1966),
370 F. 2d 250 28

Warden v. Hayden (1967),
387 U.S. 294, 87 S.Ct. 1642,
18 L.Ed. 2d 782 31

Weeks v. United States (1914),
232 U.S. 383, 34 S.Ct. 341,
58 L.Ed. 652 ..... 37, 38, 43

Wolf v. Colorado (1949),
338 U.S. 25, 69 S.Ct. 1359,
93 L.Ed. 1782 ..... 38, 40, 45

Younger v. Harris (1971),
401 U.S. 37, 91 S.Ct. 746,
27 L.Ed. 2d 669 47

Page

UNITED STATES CONSTITUTION

Fourth Amendment 2, 34

STATUTES AND RULES

28 U.S.C. §1254 (1) 2

Rule 52 (a), Federal Rules of Civil Procedure 2, 10, 16, 47

Wisconsin Statutes

Sec. 270.58 44

Sec. 946.12 (2) 43

TEXT

Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Ch. L. Rev. 665 (1970) 39

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-586

ELMER O. CADY, WARDEN,

Petitioner,

-v.-

CHESTER J. DOMBROWSKI,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Dombrowski v. Cady* (7th Cir., 1972), 11 Cr. L. 2289, and is printed in the appendix to the petition. The opinion of the District Court is reported as *Dombrowski v. Cady* (E.D. Wis., 1970), 319 F. Supp. 530 (A. 22).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 2, 1972. A timely petition for

rehearing en banc was denied on July 24, 1972. Petition for certiorari was filed October 11, 1972, and certiorari was granted December 11, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 52 (a) of the Federal Rules of Civil Procedure:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

QUESTIONS PRESENTED

1. Is a police officer engaged in a "search" within the meaning of the Fourth Amendment when, seeking to locate property of a person under arrest for drunk driving, he opens the trunk of the person's disabled vehicle and discovers what later develops to be evidence of a murder of which he had no previous knowledge or suspicion?

The Court of Appeals held in the affirmative.

2. If the first question is answered in the affirmative, is such a search "unreasonable" within the meaning of the Fourth Amendment?

The Court of Appeals held in the affirmative.

3. Where a judge issues a written order for the search and an oral order for impounding of a vehicle for evidence of the crime of murder and the vehicle is thereafter seized and removed to a police garage, is evidence obtained in the search the following day admitted at trial in violation of Fourth Amendment rights?

The Court of Appeals held in the affirmative.

4. Does the "exclusionary rule" serve society's needs?

Not considered by the Court of Appeals.

STATEMENT OF THE CASE

The respondent was convicted by a jury on July 18, 1968, of first-degree murder and was sentenced to life imprisonment. The Wisconsin Supreme Court affirmed the jury conviction, *State v. Dombrowski* (1969), 44 Wis. 2d 486, 171 N.W. 2d 349.

This habeas corpus proceeding followed and the District Court denied the writ following the Wisconsin Supreme Court's opinion holding that Dombrowski's Fourth Amendment rights were not violated.

Appeal was taken to the United States Court of Appeals for the Seventh Circuit and on June 2, 1972, that court ruled that the respondent's Fourth Amendment rights were violated in the obtaining of evidence introduced at his trial. Rehearing was denied by a divided court, with Senior Circuit Judge Knock voting to grant a rehearing.

At about 10:30 p.m. on September 11, 1967, the respondent, a Chicago police officer off duty, was involved in a one-car automobile accident in which the vehicle, a leased 1967 Ford Thunderbird, was rendered inoperative north of Kewaskum, Wisconsin. After being arrested for drunk driving Dombrowski pleaded for consideration because of his police officer status. (A. 83).

At about 2:00 a.m. on September 12, 1967, the respondent was examined in St. Joseph's Hospital at West Bend, Wisconsin, where he had been taken because of injuries, intoxication, and incoherency. Shortly thereafter, William Weiss of the Washington County, Wisconsin, Sheriff's Department returned to the Ford Thunderbird, which had been towed and parked outside of Honeck's Garage in Kewaskum (A. 71), in an attempt to locate respondent's service revolver which he

understood Chicago police officers were required to carry with them at all times. (A. 86, 110).

When Officer Weiss returned to the unattended vehicle he inspected the inside and found a book of rules and regulations of the Chicago Police Department but no gun. Then, still looking for the service revolver, Officer Weiss opened the trunk of the car. There he discovered a number of blood-covered items, including a pair of uniform pants, a pair of grey trousers, a policeman's nightstick with the name Dombrowski stamped on it, a uniform raincoat, a car-floor tarp or mat, a pail and towel, and numerous other items. The blood on some of these items was dry, but on others, particularly the car-floor mat, was still wet. (A. 97).

While still under arrest for drunken driving, the respondent was questioned concerning the blood-covered items recovered from his vehicle. He asked to confer with an attorney and subsequently the attorney, under the respondent's directions, informed the Washington County District Attorney that there was a body lying near the family picnic area at the north end of his brother's farm. Shortly thereafter the dead body of a white male was found lying in a dump area of the farm. A single white sock was found near the body.

Subsequently, one of the investigating officers looked through the windows of a Dodge automobile parked in the farmyard a few hundred yards from the body. He saw a blood-covered briefcase on its floor. The back seat of the car and the back of the front seat of the car were also splattered or covered with blood. (A. 143). Armed with the information concerning the blood-covered items discovered in the Thunderbird, the discovery of the body, and the observations of the blood in various areas of the Dodge automobile, the district attorney and the sheriff applied to the county judge of Fond du Lac County for the issuance of a search warrant to search the Thunderbird and the Dodge for further

evidence of murder. The judge issued the warrants to search the vehicles and an order was made during the proceedings directing the sheriff to impound both vehicles. (A. 44). Shortly after the warrants were issued at 8:15 p.m. on September 12, 1967, a cursory examination of the Dodge vehicle was made at the scene and the vehicle was then towed to the sheriff's garage at Fond du Lac where it was marked as Exhibit #40 at the trial and still is being held as evidence. (A. 124).

The following morning, September 13, 1967, experts Cleon Mauer and Kenneth Sundberg from the State Crime Laboratory, who had been called in by the sheriff, assisted sheriff's officials in searching the inside of the Dodge vehicle for bloodied items constituting evidence of murder. (A. 158). On that date, the experts from the Crime Laboratory took into their possession, at the request of the sheriff for laboratory examination, all of the bloodied contents of the Dodge vehicle, including the back seat, front seat, backrest of back seat, a white sock, a portion of the floor mat in the rear, an attache case, and front floor mat, all of which were taken to the Crime Laboratory for clinical tests and later returned to the sheriff.

Although a partial, inaccurate, written return was prepared in regard to both search warrants on September 13, 1967, those returns were not filed with the Court until September 14, 1967 (A. 33, 36), at which time the county judge took testimony concerning the execution of both search warrants (A. 49).

All of the bloodied items found in the search of the Dodge, as well as the items found in the trunk of the Thunderbird, were introduced and accepted as evidence at the trial.

After the Wisconsin Supreme Court affirmed the conviction, the respondent filed the present action in the District Court for the Eastern District of Wisconsin on March 10, 1970. (A. 7).

On April 10, 1970, following a conference, the Court entered an order directing that if Dombrowski wanted an evidentiary hearing the Court should be notified by April 17, 1970, and any such hearing would be limited to proof relating to the allegations of paragraph 10 (c) of the petition. The order further provided that the entire state court record, including briefs filed in the Wisconsin Supreme Court and the records relating to pretrial requests for a writ of prohibition, would be filed by the State. (A. 21).

On June 5, 1970, a stipulation was entered into between the parties that five exhibits would constitute the entire state court record for determination of the habeas corpus action. These exhibits, presently on file with this Court, are designated as:

Exhibit A - which is a part of the state trial court record, including the indictment, warrant, search warrants, transcripts of returns to search warrants, receipts for vehicles, pretrial motions, decisions and orders on pretrial motions, memorandum decision on motions after verdict, and notice of appeal to the Wisconsin Supreme Court, consisting in all of 71 pages;

Exhibit B - consisting of appellant's brief, respondent's brief, reply brief of appellant, and appellant's brief in support of motion for rehearing, all filed with the Wisconsin Supreme Court;

Exhibit C - the murder trial transcript consisting of 726 pages;

Exhibit D - papers concerning an action in the Supreme Court of Wisconsin whereby an attempt was made to get a writ of prohibition to prevent the county court from requiring one of Dombrowski's attorneys to testify at the grand jury; and

Exhibit E - consisting of the briefs of counsel and court order in the prohibition action referred to in Exhibit D.

Neither Exhibit D nor Exhibit E is relevant to the issues being considered in this review.

The other portions of the record filed with the Court include 23 documents involved in the District Court proceedings and four documents from the United States Court of Appeals for the Seventh Circuit. The record is not paged consecutively.

In its decision and order of December 2, 1970, the District Court made the following findings:

1. The examination of the Thunderbird at the garage was not a search in the *Preston* sense, but rather an inspection designed to locate an article of value to be protected by those responsible for its custody. (A. 26-27).

2. Since this was not a search for incriminating evidence it was constitutionally permissible. (A. 27).

3. There was no suspicion on the part of the officers of any other misconduct by the defendant. The deputy was interested only in protecting the property of Dombrowski. (A. 27).

4. In seeking to locate the service revolver, the deputy came upon blood-splattered articles which he could not be expected to ignore. (A. 27).

The District Court also found that none of the other various grounds advanced by the petitioner reached such constitutional proportions to warrant granting of the writ. (A. 27). This finding included paragraph 11 (e) of the petition for the writ of habeas corpus which alleged that Mr. Cleon Mauer of the State Crime Laboratory conducted a search of the Dodge automobile on September 13, 1967, without a search warrant. (A. 14).

By stipulation between the parties the appeal record filed with the United States Court of Appeals for the Seventh Circuit did not include Exhibits A, B, C, D and E of the record unless the Appeals Court ordered or any party requested transmittal. (A. 28). Therefore, the record in the Appeals Court consisted of the first 14 documents filed herein by the District Court, made up mainly of the pleadings in the case, a copy of the Wisconsin Supreme Court decision, and the decision and order of the District Court.

The District Court record of proceedings filed herein does not indicate that any subsequent request for the remaining portions of the record to be sent to the Court of Appeals was made by either party or the court itself after the stipulation of the parties concerning retention of portions of the record by the District Court on January 20, 1971, and the forwarding of the record to the Appeals Court on February 1, 1971.

The Court of Appeals held that the actions of Officer Weiss constituted an unconstitutional search of the Thunderbird automobile for incriminating evidence of offenses other than drunk driving. It also held that the recovery of the bloodied

floor mat and bloodied sock from the Dodge automobile was the result of an unconstitutional search after the search warrant had been returned and became *functus officio*.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Seventh Circuit had no basis for changing the findings of the District Court because there was no evidence before the Appeals Court on which they could conclude that the findings of the District Court which were concurrent with the state trial court's findings were "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

The court below erred in applying the standards of *Preston* to the inspection of the Thunderbird, since there was prior justification and inadvertence in this case.

The court below erred in concluding that the search warrant for the Dodge was *functus officio* when Mauer, the Crime Laboratory specialist, took up the piece of floor mat and bloody sock on September 13, 1967, and, regardless, the Dodge vehicle itself was evidence which had been impounded by authority of the court and, even without that authority, the investigating officers could have seized the vehicle as evidence without a search warrant.

The application of the exclusionary rule to prevent the use of the evidence discovered in the Thunderbird and Dodge automobiles in this case would result only in the murderer going free. The supposed benefit to society by teaching Officer Weiss and Undersheriff Howard, and thousands of other officers throughout the country, how to conduct proper searches is completely illusory.

ARGUMENT

I. The Findings And Conclusions Of The Court Below That Weiss Was Searching The Thunderbird For Incriminating Evidence Of Other Offenses And That Mauer "Took Up" The Piece of Bloodied Mat And White Sock From The Dodge After The Search Warrant Was *Functus Officio* Are Not Supported By The Record.

A. Officer Weiss was not searching for incriminating evidence of other crimes.

Apparently the findings of the Appeals Court were based on the pleadings and briefs and arguments of counsel primarily. With this limited access to the factual record, the Appeal Court changed the District Court findings and conclusions concerning the "searches" of the Thunderbird and the Dodge.

In referring to Officer Weiss's discovery of the bloodied materials in the Thunderbird, the court concluded that

> "The search must therefore have been for incriminating evidence of other offenses." (Petition A. 104).

To reach such conclusion the court changed the findings of the District Court that Officer Weiss was motivated solely by the desire to locate the revolver he thought was in the Thunderbird. The only evidence in the record relating to Officer Weiss's motivation is his testimony. It was not shaken on cross-examination and no other evidence was produced at the hearing on motions to suppress, at the trial or voir dire examination, at the hearing on motions after verdict, or at the District Court trial to change the record regarding his motivation.

It is interesting to examine the State and District Court findings filed with this Court and compare them with new findings of the court below in regard to the so-called search of the Thunderbird. A pretrial motion was made by Dombrowski to the County Court of Fond du Lac County concerning the suppression of the evidence taken from, among other places, his automobiles. In his decision and order on the motion to suppress filed with the Court on June 18, 1968, the county judge found in part as follows (A. 57-58):

> "* * * The defendant has failed to meet this burden of proof in regard to the alleged search by the Washington County authorities; he called no witness in regard thereto nor any of the Washington County authorities that may have participated in the alleged original search of the Thunderbird, which facts and circumstances, so far as the record now stands, indicates that the original search of the Thunderbird was a routine police procedure, when they were charged with the responsibility of safekeeping of the defendant's property pending his release and return of his property to him.
>
> "There is nothing in the record to indicate that the Washington County authorities knew anything of any alleged murder at the time they went to search the Thunderbird and the defendant's personal articles, if any, at which time the defendant was under arrest and charged with operating an automobile while intoxicated and was in a West Bend hospital.
>
> "It would appear to the Court that the record so far as any articles taken from the Thunderbird by the Washington County authorities as a result of a custody search of the same after it was towed off the highway in a

damaged condition, pursuant to police order, was nothing more than good routine police work to protect the personal property of Chester J. Dombrowski."

At trial, Officer Weiss testified that Dombrowski continually told him that he was a Chicago policeman. Weiss described him as being in a drunken state (A. 83) and that he was incoherent at times (A. 83).

Weiss also testified that while Dombrowski was being examined by the doctor at the hospital "* * * his left leg started to shake heavily; he tipped his head back, and when the doctor asked him a question, he pointed to his mouth with his right hand and made noises; he did not answer any questions, and he continued to shake and make noises out of his mouth." (A. 84). Weiss left the hospital and drove to Honeck's Garage, where the Thunderbird was parked outside of the garage (A. 71, 72), because it had been established that Dombrowski was a member of the Chicago Police Department, in an attempt to find his service revolver (A. 86).

At trial a voir dire examination outside of the presence of the jury was asked for by the defendant and granted by the Court. During this voir dire examination it was established that there was no sheriff's official guarding the Thunderbird (A. 91), which at that time was parked outside of the garage (A. 71), that Officer Weiss was looking for Dombrowski's service revolver and that this was standard procedure in his department (A. 73, 91). The Court then ruled that nothing had been produced in the voir dire examination which would vary the Court's previous determination on Dombrowski's motion to suppress evidence (A. 87, 93).

The issue concerning whether Officer Weiss's actions in discovering the evidence in the trunk of the Thunderbird

violated Dombrowski's Fourth Amendment rights was litigated again in motions after verdict. In his memorandum decision filed August 1, 1968, the county judge made the following findings:

> "There appears to be no question but that the arrest of Dombrowski by the Washington County Police for operating an automobile while under the influence of intoxicating liquor was a bona fide arrest; that the defendant, Dombrowski, at that time was under police custody and in no position to look after the welfare of his property that had been involved in the accident, namely the Thunderbird and other personal items that he may or may not have had in said vehicle. The Washington County Police believed that a metropolitan policeman off duty carries a revolver, and they did look in the Thunderbird for the revolver. However, there was no evidence of this being an exploratory search by the officer for any reason other than to secure items of a personal nature that may have been in the wrecked automobile, and parked outside at this time, for the general benefit of the defendant, Dombrowski. It is significant at this point that when Officer Weiss made the search of the Thunderbird that he had no information whatsoever that the defendant, Dombrowski, was involved in any violation of the law other than the operating [of] an automobile while under the influence referred to above, and that the only motivation of Officer Weiss in searching the Thunderbird was to safeguard the defendant's property during the period of time that he may be hospitalized or in official custody and unable to look after the same himself." (A. 72).

Next, the Wisconsin Supreme Court considered the question of Officer Weiss's motivation in searching for Dombrowski's service revolver. That court concluded:

> "The majority of the court is convinced that this inspection was done within a reasonable time of the car's transfer to the Kewaskum garage, and was accomplished while the police were responsible for its protection and were in the process of protecting Dombrowski's property and were not, at that time, engaged in a search of the car looking for incriminating evidence."/1

The next court to consider Officer Weiss's motivation was the United States District Court for the Eastern District of Wisconsin. That court concluded:

> "* * *Although the line is a narrow one, I conclude that the examination of the car at the garage was not a search in the *Preston* sense, but rather it was an inspection designed to locate an article of value, to be protected by those responsible for its custody. This was not a search for incriminating evidence and is constitutionally permissible under *Harris*." (A. 26).

The evidence before the District Court included the trial transcript which established a clear factual basis for the finding. Although Dombrowski had the opportunity under the court order of April 10, 1970, to present additional evidence to support the allegations in paragraph 10 (c) of his petition for writ of habeas corpus, the record is barren of any indication that such evidence was presented. (A. 21).

The next step in this five-year odyssey of Officer Weiss's opening of the trunk of the Thunderbird takes place

---

/1*State v. Dombrowski* (1969), 44 Wis. 2d 486, 496, 171 N.W. 2d 349, 355.

before the United States Court of Appeals for the Seventh Circuit in Chicago, Illinois, where on June 2, 1972, that court made a factual finding which they considered supported by the evidence in the record that Officer Weiss, in opening the trunk of the Thunderbird, was motivated by a desire to secure evidence of "* * * incriminating evidence of other offenses." Thus, the Court of Appeals made a finding on a critical fact question diametrically opposed to the finding of the trial court. It is submitted that the record clearly fails to establish that the trial court finding was "clearly erroneous" within the meaning of those words as used in Rule 52 (a) of the Federal Rules of Civil Procedure. Although this Court has indicated that it will not review findings of fact in the absence of a very obvious and exceptional showing of error,/[2] it has indicated that it will not hesitate to undertake independent examination of factual issues when constitutional claims may depend on their resolution./[3]

The findings of the District Court were concurrent with the state trial court's findings which were based upon the District Court's examination of the state trial court record, whereas the Court of Appeals did not have the benefit of the state trial court record, Appeal Exhibit C, but despite this handicap proceeded to reweigh the evidence and findings concerning the credibility of the testimony of Officer Weiss and have ended up with "clearly erroneous" findings. The courts of appeal should not reweigh the evidence and findings

---

/[2]*Graver Tank and Mfg. Co. v. Linde Air Prod. Co.* (1948), 336 U.S. 271, 69 S.Ct. 535, 93 L.Ed. 672.

/[3]*Berenyi v. District Director, Immigration and Naturalization Service* (1967), 385 U.S. 630, 87 S.Ct. 666, 17 L.Ed. 2d 656; *Napue v. People of State of Illinois* (1959), 360 U.S. 264, 271-272, 79 S.Ct. 1173, 1178-1179, 3 L.Ed. 2d 1217; *Fiske v. State of Kansas* (1927), 274 U.S. 380, 385-386, 47 S.Ct. 655, 656-657, 71 L.Ed. 1108. Cf. *Hoffa v. United States* (1966), 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed. 2d 374.

concerning credibility. *United States v. Iacullo* (7th Cir., 1955), 226 F. 2d 788, 795, cert. den. 350 U.S. 966, 76 S.Ct. 435, 100 L.Ed. 839.

Accordingly, this court should make an independent examination of the factual issue concerning Officer Weiss's motivation for opening the trunk of the Thunderbird. It is submitted that a very obvious and exceptional showing of error is made in this record which should be corrected by reinstating the District Court finding.

B. The search warrant for the Dodge was not functus officio when Mauer "took up" the mat and sock.

The court below seems to be confused as to the sequence of events which led up to Mauer, the Crime Laboratory specialist, taking up the piece of floor mat and the bloody sock in the Dodge and labeling them on September 13, 1967. The court concluded:

> "There was no continuing authority under the warrant issued the previous night. First, these items were not described in the warrant and presumably were not observed that night. Second, when the warrant was returned—before Mauer came on the scene—it was *functus officio.* A 'new ball game,' so to speak, began when Mauer made his 'inspection.' " (Petition A. 111).

The error in that paragraph, which is obvious when the search warrant and the transcript of the hearing at the time of the return are examined (neither of which were available to the Court of Appeals because they were in Exhibit A which was retained in the District Court file), is that the search warrant was not returned until September 14, 1967, a full day after Mauer recovered the evidence while assisting

the sheriff in removing from the Dodge automobile all of the bloodied contents, including the bloodied back seat and attache case originally seen by Undersheriff Howard (A. 161, 153), but also including the front seat (A. 161), backrest of the back seat (A. 161), a white sock (A. 154), a portion of the floor mat in the rear (A. 153), and front floor mat (A. 154), all of which were taken to the Crime Laboratory for clinical tests (A. 51) and later were marked as evidence at the trial.

The portion of the original trial record on file with this Court, marked Exhibit A, includes a copy of the search warrant for the 1960 Dodge and the return of the officer. Both are marked with a filing stamp of the Court dated September 14, 1967. (A. 31, 33). The transcript of the hearing on the return of the search warrant to the court is also a part of Exhibit A and clearly shows that the proceedings on the return were held on the 14th day of September, 1967. Since the warrant was issued on September 12, 1967, and the court ordered the return to be made in 48 hours, the return date on the 14th was well within the limit set by the Court.

Although it might be said that the return is incomplete and that even the transcript of the hearing on the return does not mention all of the contents of the Dodge which were taken to the Crime Laboratory for examination, those questions are not before the Court and do not reach constitutional proportions. *Mills v. Maryland* (1971), 12 Md. App. 449, 279 A. 2d 473, cert. den. 406 U.S. 967, 92 S.Ct. 2411, 32 L.Ed. 2d 666; *United States v. Moore* (6th Cir. 1971), 452 F. 2d 569, cert. den. — U.S. —, 92 S.Ct. 2435, 32 L.Ed. 2d 684.

In the *Moore* case it was contended that evidence not listed in the return to the search warrant was admitted at trial in violation of federal constitutional rights. The Court

of Appeals refused to so hold, citing *Rose v. United States* (6th Cir., 1921), 274 F. 245, 250-251, cert. den. 257 U.S. 655, 42 S.Ct. 97, 66 L.Ed. 419. The Court reasoned that defense counsel had adequate opportunity to cross-examine witnesses during trial to establish how the evidence in question was obtained and whether any constitutional rights were violated.

The factual findings and conclusions of the District Court were well supported by evidence in the record in regard to the evidence obtained from the Dodge automobile by the Sheriff of Fond du Lac County and his agents. In reviewing the District Court findings, the Court of Appeals responsibility is not to substitute findings it could have made had it been the fact-finding tribunal but its sole function is to review the record to determine whether findings of the District Court were clearly erroneous. *Speyer, Inc. v. Humble Oil and Refining Co.* (3rd Cir., 1968), 403 F. 2d 766, cert. den. 394 U.S. 1015, 89 S.Ct. 1634, 23 L.Ed. 2d 41. It is not the function of the Court of Appeals to reevaluate evidence presented below and the Court cannot substitute its judgment for the firsthand evaluation made by the trier of fact. *Cataphote Corp. v. De Soto Chemical Coatings, Inc.* (9th Cir., 1966), 356 F. 2d 24, cert. den. 385 U.S. 832, 87 S.Ct. 71, 17 L.Ed. 2d 67.

It is true that in *Guzick v. Drebus* (6th Cir., 1970), 431 F. 2d 594, the Court held that when dealing with questions of constitutional magnitude the Court of Appeals is not at liberty to accept the fact-trier's findings merely because it considers them not "clearly erroneous" and this Court denied certiorari, 401 U.S. 948, 91 S.Ct. 941, 28 L.Ed. 2d 231. However, in that case, the Court of Appeals made its own examination of the material from which the decision was

made. In this case, the Court of Appeals entered findings inconsistent with the District Court findings without examining the factual record upon which the District Court findings were made.

Accordingly, this Court should reinstate the findings of the District Court, since there has been no showing that those findings were clearly erroneous.

II. Officer Weiss Did Not Conduct A "Search" Of The Thunderbird Within The Meaning Of The Fourth Amendment.

Assuming that this Court agrees that the findings of the District Court should be restored in regard to Officer Weiss's motivation, then it must be concluded that his actions in seeking to recover the property of Officer Dombrowski did not constitute a search within the meaning of the Fourth Amendment.

> "A search implies an examination of one's premises or person with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest. * * *" *Haerr v. United States* (5th Cir., 1957), 240 F. 2d 533, 535.

Law enforcement officers in our society perform a number of functions, only one of which is the investigation of criminal activity and the securing of evidence to be used in criminal prosecutions. Many responsibilities relate to public health and safety not directly related to the ferreting out of crime. Their primary responsibility actually is the guarding of the lives and the property of citizens of their

community. This includes, of course, the securing of the property of one who is in their custody and the safekeeping of that property. When such nonaccusatory functions are being carried out and there is no suspicion of criminal activity, the official functions do not constitute a search within the meaning of the Fourth Amendment. That amendment provides protection only against "searches and seizures" that are "unreasonable." Police discovery of evidence obtained by means other than a "search" is not affected by the Fourth Amendment and the evidence may be seized. *Frazier v. Cupp* (1969), 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed. 2d 684.

Any careful survey of the case law relevant to this appeal convinces one that "reasonableness" is an elusive concept sometimes distinguished and confused behind language relating to the intensity of the search, the belief that a crime has or has not been committed, the location of the search, and various other factors. The court below suggests a belief that incriminating evidence discovered in the course of a nonaccusatory "search" or "inspection" will be automatically inadmissible at trial unless the circumstances leading to the discovery can somehow be fit into one of several acceptable "criminal" contexts. Thus, the Court enumerated the pigeonholes which this case would not fit into, such as "* * * no basis upon which the police could reasonably decide that they were in danger, or that the Ford was a 'fleeting target' which posed danger to evidence, or which might be driven out of the jurisdiction so as to invoke the exception to the Fourth Amendment warrant clause enunciated in *Carroll v. United States*, 267 U.S. 132 (1925)."

The Court further concluded that there was no justification under *Chambers v. Maroney* (1970), 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419, because there was no justification to search except to look for the gun in the interests of safety.

The Court went on to conclude that under *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564, there are few exceptions to the doctrine that warrantless searches are per se unreasonable and in order to come within one of the exceptions it must be shown that the "exigencies of the situation" rendered the warrantless search imperative. The conclusion was that there was no pigeonhole into which this case could be fitted and that under *Preston v. United States* (1964), 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed. 2d 777, the search of the Thunderbird was unreasonable.

Little more than passing mention was given to *Harris v. United States* (1968), 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 2d 1067, on which the Supreme Court of Wisconsin and the District Court based their determinations that Officer Weiss's actions did not constitute a search for incriminating evidence and was constitutionally permissible.

The only conceivable reason for the Appeals Court not finding *Harris* reasonably analogous to the case at bar is that they concluded that Officer Weiss was actually searching for evidence of other crimes. If this Court restores the District Court finding, it would seem to be appropriate to find the analogy between this case and *Harris*. In both cases the evidence was discovered as a result of a measure taken to protect the property of the person in custody. In both cases the officer had a right to be in the position he was in when the objects fell in plain view.

The fact that the officer in *Harris* was operating under a specific regulation in dealing with custody procedures in connection with impounded vehicles and Officer Weiss was operating under his department's "standard procedures" to secure in a place of safety property of persons in custody

of his department, would seem to make little difference because the standard is subjective, i.e., the officer's reasons for being where he was so that he would be in a position to view the evidence which was subsequently seized.

The lower court's reliance on *Preston* is misplaced. In *Preston* the search was thought to be justified primarily on the ground that it was incidental to and part of a lawful arrest. This Court said that "* * * Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest. * * *" 84 S.Ct. at 883. No claim was made to the lower court that the inspection of the Thunderbird was a search incident to an arrest. In *Preston* it was alternatively argued that the search was justified because the officers had probable cause to believe the car was stolen. That fact situation just does not fit the present case.

In *Harris* the Court said that the sole question for consideration was whether the officer discovered the registration card by means of an illegal search and concluded that he did not. This Court said, at 88 S.Ct. 993:

> "* * * The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. * * *"

These precise and detailed findings were noted in the Court of Appeals decision in that case, *Harris v. United States* (D.C. Cir., 1966), 370 F. 2d 477, 478, note 3. That situation is similar to the thorough treatment given to the question of Officer Weiss's motivation by the state trial

court at a hearing on motions to suppress before trial, at the voir dire examination at trial, and again at a hearing on motions after verdict.

This Court considered this question of prior justification and inadvertence in *Coolidge*, where the Court said, at 91 S.Ct. 2038:

> "* * * Finally, the 'plain view' doctrine has been applied where a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object. Harris v United States, 390 US 234, 19 L Ed 2d 1067, 88 S Ct 992; Frazier v Cupp, 394 US 731, 22 L Ed 2d 684, 89 S Ct 1420; Ker v California, 374 US, at 43, 10 L Ed 2d 743. Cf. Lewis v United States, 385 US 206, 17 L Ed 2d 312, 87 S Ct 424.
>
> "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. * * *"

However, see *North v. Superior Court*, 11/16/72, 12 Cr. L. 2232, where the California Supreme Court concludes that there was no majority behind Mr. Justice Stewart's position that "inadvertence" is a necessary element of the plain-view exception.

The lower court cited language from *Coolidge* to the effect that "* * * warrantless searches are per se unreasonable." Of course, the first question to be determined is whether Officer Weiss was actually engaged in a search. If *Harris* and the "plain view" doctrine are to be applied where a police officer is not searching for evidence against the accused but nonetheless inadvertently comes across an incriminating object, then *Coolidge* is no problem.

The *Coolidge* case has not necessarily clarified the complicated status of search and seizure law. Rather, the case has emphasized the problems facing law enforcement officials and the courts in administering the law so that the interests of society and persons accused of crime are both recognized and protected.

However, *Coolidge* reaffirmed the doctrine of *Harris* that where an officer had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating an accused, the "plain view doctrine" removed the act from the warrant requirement.

In *Harris* the Court held that the evidence was not obtained as a result of a search but as the result of a police measure taken to protect the vehicle while it was in police custody. The Court in *Harris* reasoned:

> "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible. * * *" 88 S.Ct. 992 at 993.

The Court specifically declined to rule on the admissibility of evidence found as a result of a search required of an impounded vehicle by regulations of the metropolitan police department because no search under such regulation was involved.

Recently the Supreme Court of Virginia held that evidence obtained from an automobile, which was taken to the property room of the police department under department regulations where the contents of the car were removed, inventoried and stored for safekeeping, was secured as a result of efforts designed to protect the property of a citizen arrested away from home and did not violate Fourth Amendment rights. *Cabbler v. Virginia* (1971), 212 Va. 520, 184 S.E. 2d 781; this Court denied certiorari, 405 U.S. 1073, 92 S.Ct. 1501, 31 L.Ed. 2d 807.

It might be concluded that *Harris* stands on the proposition that where the initial intrusion is bottomed on police action designed to protect the property of one in custody, the Fourth Amendment does not require the police to obtain a warrant, because there was no search and, regardless, a warrant would not issue under such facts. This would seem to end the matter and not require any further justification. Instead, the Court went on to cite the "plain view" doctrine either as primary or additional justification.

It appears, therefore, that the "plain view" doctrine was the primary justification for the *Harris* result. This position is substantiated by the language from *Coolidge*, supra, referring to the "plain view" doctrine as having been applied in *Harris*. 29 L.Ed. 2d 583.

While it is the position of the petitioner that Officer Weiss had a right to be in the position to have the view to observe the evidence which he seized and, therefore, his actions would be justified under the "plain view" doctrine, his actions should more appropriately be classified as not being a search within the meaning of the Fourth Amendment and, therefore, no existing pigeonhole need be found on which to base the justification. If no search within the meaning of the Fourth Amendment, then no need to find the pigeonhole of justification. If "* * * this initial intrusion is justified * * * by an extraneous valid reason for the officer's presence," there is no unconstitutional search. Once having determined that the officer had a right to be in a position to view the evidence, seizure is not difficult to justify.

Accordingly, it is urged that the Court determine, in accordance with *Harris* and *Coolidge*, that the discovery of the bloodied materials in the trunk of the Thunderbird

was inadvertent, not the result of a search of the car but of a measure taken to protect the property of Dombrowski and that, therefore, there was no search within the meaning of the Fourth Amendment, and the objects which were in plain view of the officer were subject to seizure and subsequent introduction as evidence against Dombrowski.

It is submitted that a "search" within the meaning of the Fourth Amendment should be defined to include the following two elements:

(1) An examination of an area wherein one enjoys a reasonable expectation of privacy or freedom from governmental intrusion

(2) with an intention of discovering evidence of the commission of a violation of the law.

III. If There Was A "Search," It Was Reasonable Within The Meaning Of The Fourth Amendment.

If the Court is unable to conclude that Officer Weiss's action did not constitute a search within the meaning of the Fourth Amendment, and if the statement in *Coolidge* that "* * * plain view does not occur until a search is in progress," 91 S.Ct. 2039, is controlling, then we would urge that the "plain view" doctrine applies and the search was reasonable.

The reasonableness of an act of course must be judged by the circumstances surrounding the act. In this case, Dombrowski had repeatedly asserted his status as a Chicago police officer, he became incoherent at the hospital and could not be communicated with at the time, the damaged Thunderbird was left outside of Honeck's garage, Officer Weiss understood that Chicago police officers carry their weapons

with them at all times, Officer Weiss understood his duty under his department's "standard procedures" to be to secure in a place of safety property of persons in custody of his department, and he had no knowledge of Dombrowski being involved in a murder or any other crime except drunk driving.

In addition to *Harris*, several other cases decided by various courts of appeals have held similar conduct to be reasonable. In *Vauss v. United States* (D.C. Cir., 1966), 370 F. 2d 250, police found the defendant unconscious on the sidewalk and called an ambulance when they could not rouse him. In searching his pockets for identification to give the hospital, they found narcotics which were held admissible at trial because the search for identification was reasonable. In *United States v. Graham* (6th Cir., 1968), 391 F. 2d 439, cert. den. 393 U.S. 941, 89 S.Ct. 307, 21 L.Ed. 2d 278, it was determined that an examination of an automobile properly in police custody is not a search and that evidence of the serial number of the car obtained in the examination is not excludable. In *DiMarco v. Greene* (6th Cir., 1967), 385 F. 2d 556, the garageman having custody of an impounded car got into the driver's seat in order to move the car and noticed a gun partly concealed on the front seat. In *United States v. Blackburn* (6th Cir., 1968), 389 F. 2d 93, the police invaded the privacy of an arrestee's motel room pursuant to their usual procedure of gathering up, itemizing, and storing the effects of a transient who was arrested, and itemization of the room's contents revealed an incriminating gun and notebook; and in *Marshall v. United States* (5th Cir., 1970), 422 F. 2d 185, an officer walked up to a parked car which had been called to his attention by someone who believed that the driver might be ill, looked into the car from the outside and saw a sawed-off shotgun in plain view.

It is urged that the conduct of Officer Weiss was reasonable and, therefore, he was rightfully in a position to view the trunk of the Thunderbird and its contents. As the Court said in *Coolidge:*

> "* * * And, given the initial intrusion, the seizure of an object in plain view is consistent with the second objective, since it does not convert the search into a general or exploratory one. * * *" 91 S.Ct. 2039.

IV. The 1960 Dodge Was Impounded As Evidence Under Authority Of Search Warrant.

Not only has the Appeals Court made an erroneous finding that the search warrant for the 1960 Dodge was *functus officio* when Mauer, the Crime Laboratory specialist, removed the bloodied white sock and blook-soaked partial floor mat, but also ignored was the fact that the vehicle itself was seized and towed to the sheriff's garage where the sheriff had experts from the Crime Laboratory come in and thoroughly examine this piece of evidence so that it and its contents could be developed to the fullest possible extent in connection with an anticipated murder prosecution.

A more detailed review of the factual situation leading up to the application for the search warrant and the subsequent seizure of the vehicle seems appropriate at this time.

After the Washington County officials had seized the bloodied material from the Thunderbird trunk, including part of the floor mat from the back of a Dodge car filled with blood (A. 21), Dombrowski asked to confer with an attorney who later advised the Washington County officials that a body would be found on the Dombrowski farm. Situated on the

Dombrowski farm, a few hundred feet from where the body was found, was the Dodge vehicle owned by Dombrowski (A. 44). A search warrant was authorized by the Court for both the Thunderbird and the 1960 Dodge, and Undersheriff Raymond Howard was directed "* * * to search both vehicles and impound the same and make a report to this Court as to his findings within the next 48 hours." The Court further ordered that Howard and "* * * any of his assistants that he calls to his help are entitled to search the vehicles mentioned * * *." (A. 44).

These proceedings were held at approximately 8:02 p.m. on September 12, 1967, and by 10:00 p.m. that same date the Dodge vehicle was hauled by wrecker to the Safety Building garage in Fond du Lac where it was locked up in the garage (A. 163).

The next morning sheriff's officials and the experts from the Crime Laboratory, Mauer and Sundberg, who were called in to assist the sheriff and remove bloodied items from the Dodge, including the back seat (A. 161), front seat (A. 161), backrest of the front seat (A. 161), a section of floor mat (A. 153), a brown leather attache case (A. 153), front floor mat (A. 154), and a white sock (A. 154).

Thereafter a written, partial return to the search warrant was executed by Mr. Howard on the 13th of September, 1967, and it was filed with the Court on September 14, 1967 (A. 33). A formal, oral return was made to the search warrant on the 14th day of September, 1967, at 10:25 a.m., and Mr. Howard advised the Court under oath that the 1960 Dodge had been impounded and was in the Safety Building in Fond du Lac (A. 50). He further advised the Court that a large area of blood, covering over 12 inches in diameter, in the rear seat

had been found, there was blood on the briefcase, and blood splattered on the back of the front seat. He further advised the Court: "* * * the Sheriff has turned the briefcase and so forth over to the Wisconsin State Crime Laboratory for further investigation." (A. 51).

The Dodge vehicle remained in the custody of the sheriff until it was marked as Exhibit No. 40 at the trial (A. 124). That the automobile itself was a necessary piece of evidence becomes very obvious when we consider that it was established at trial that the murder victim bled to death in the Dodge automobile which was to be the most significant piece of evidence in establishing venue in Fond du Lac County, a necessary element of the crime of murder in the State of Wisconsin. Undersheriff Howard concluded, after seeing all of the blood-soaked items from the Dodge, that the victim had been shot in the Dodge, and there wasn't any blood out where the body was found because it was all in the Dodge (A. 147).

Clearly the whole Dodge automobile was evidence or an instrumentality of the crime in plain sight and as such was subject to seizure and impounding. *Cooper v. California* (1967), 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed. 2d 730; *Warden v. Hayden* (1967), 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed. 2d 782; *Coolidge,* dissent of Mr. Justice White, 91 S.Ct. 2060.

> "* * * Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car *validly held by officers* for use as evidence in a forfeiture proceeding." (Emphasis supplied.) *Cooper,* 87 S.Ct. 791.

However, acting cautiously and obviously not being certain as to the latest search and seizure rules, the officers went to

the county judge to obtain a search warrant for the vehicle. Undersheriff Howard conceded that sometime before 10:00 o'clock on the night of September 12, he opened the door of the Dodge and noticed that there was still wet blood on the back seat (A. 149). However, the record is silent as to what further search or examination was made that night in the darkness prior to the vehicle being towed to the sheriff's garage. It is clear, regardless, that Mauer recovered the two pieces of evidence which the Appeals Court found contaminated, the sock and the portion of the floor mat, the following morning, September 13, while the vehicle was in the sheriff's garage.

It is not clear in the record how the Appeals Court arrived at the conclusion that the search and seizure had been completed the night of the 12th, the search warrant returned before 8:00 o'clock the morning of the 13th, and Mauer, who was assisting the sheriff, had conducted an illegal search when the warrant had become *functus officio.*

It would seem that in the situation at hand the officers would have been justified in seizing the Dodge automobile as evidence or an instrumentality of the crime without the necessity to wait until the judge had heard their evidence of probable cause and authorized the search and seizure, as Mr. Justice White said in his dissenting opinion in *Coolidge,* 91 S.Ct. 2061:

> "* * * I had not thought a search warrant was required for officers to make a seizure, see United States v. Lee, 274 U.S. 559, 47 S.Ct. 746, 71 L.Ed. 1202 (1927) (boat seized on public waters); Hester v. United States, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924) (liquor seized in open field); any more than a warrant is needed to seize an automobile which is itself evidence of crime and which is found on a public street or in a parking lot. See Cooper v. California, *supra.*"

But here we do not have a warrantless search and seizure. Here we have a vehicle which was seized and searched in accordance with the authority given to the law enforcement officers by the court. Since the car itself was evidence of a crime, it could and has been retained in official custody since it was seized. As a piece of evidence it could be examined whenever the prosecution felt it necessary to further determine the extent that the piece of evidence shed further light on the crime being investigated.

Undersheriff Howard's observations that there was no blood at the scene but an awful lot in the Dodge caused him to conclude that the victim had been shot in the Dodge. Subsequent examination of the articles in the Dodge, and the confirmation that it was indeed human blood of the type of the victim, took on even more meaning as to where the victim died when Dr. Carlovsky, the pathologist, explained that the victim had bled to death, the body rushing and pumping the blood to the wound in an attempt to preserve body functions in the brain. (A. 69).

It is clear, therefore, that the Dodge was a vital and necessary piece of evidence which was seized in its entirety before the search warrant was returned and that all evidence obtained from the Dodge was properly obtained under authority of the Court.

V. The Exclusionary Rule Should Be Modified.

A. Historical background.

The exclusionary rule, making evidence inadmissible in court if law enforcement officers obtained it by means

forbidden by the Constitution, by statute or by court rules, has been the source of considerable controversy since its wisdom was conceived some 87 years ago in a dictum in *Boyd v. United States* (1886), 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746. Essentially, the rationale supporting the exclusionary rule has purported two justifications for its existence. First, it is indisputably urged that the integrity of the Constitution must be maintained, which it is further claimed cannot be effected if the evil of government participation in illegal conduct is allowed to flourish. Second, it is asserted that excluding evidence will reduce violations of the Fourth Amendment provision that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *."

It is the latter contention which has become the subject of heated debate. There are several reasons for this. First, there are few who would deny that judicial interpretation of what constitutes an "unreasonable" search and seizure has produced a labyrinth of technical rules, the violation of any of which will render evidence seized inadmissible in court. This phenomenon has been said to have produced an atmosphere in which the well-meaning police officer will find it virtually impossible to comprehend whether his conduct is consistent with a perpetually evolving body of law. Thus, the reasoning goes that a reduction of violations of the search and seizure rules cannot be effected by excluding evidence to the extent that those rules are incomprehensible to the policeman on the street. Second, it is often noted that insofar as the exclusionary rule is operative only in court, it is incapable of deterring police misconduct when conviction of an alleged criminal is not the sole, or even

primary, objective of a particular course of action adopted by the police. Most notable in this regard are such things as the seizure of contraband (e.g., narcotics, gambling paraphernalia), the harrassment of prostitutes, and others which invite the characterization of the police proceeding on a sort of "the end justifying the means" basis. Thirdly, it is alleged that no one, save possibly the criminal, benefits from the exclusion of evidence. Most frequently cited in this regard is the compelling rhetoric of then Judge Cardozo:

> "* * * The criminal is to go free because the constable has blundered. * * * A room is searched against the law, and the body of a murdered man is found. * * * The privacy of the home has been infringed, and the murderer goes free." *People v. Defore* (1926), 242 N.Y. 13, 21, 23-24, 150 N.E. 585, 587, 588.

B. The rule in practice.

However, when all the arguments for and against the perpetuation of the exclusionary rule have been considered, the question of first importance which emerges is not whether the exclusionary rule actually works to effect the desired reduction of Fourth Amendment violations, but whether, in light of the complexity of search and seizure law today, it is even capable of doing so in the first place. Clearly it would seem that in instances of flagrant and deliberate violation of the fundamental principles declared by the Fourth Amendment the exclusionary rule will serve to give notice to the police that their conduct will not be tolerated and, hopefully, will deter the police from pursuing an illegal course of action. However, this is not to say that a law enforcement officer, believing to have acted in good faith and within the spirit of

the law, will be deterred by a subsequent finding, often years later, that his conduct in a particular situation encroached upon a judicial nuance which, in all likelihood he did not even know existed. It is in this sense that the facts and circumstances of this case should be considered. For one would be hard pressed to explain what right could be said to be vindicated, what deterrent effect accomplished, or in what sense the integrity of the Constitution preserved, should it be said, as the Court of Appeals of the Seventh Circuit has said, that in the instant situations the officers involved subjected the defendant to unreasonable searches and seizures.

We stop at this point to consider the constitutional issue presented by the circumstances of this case. Basically, this issue (whether the officers violated Dombrowski's Fourth Amendment rights) will be considered from two perspectives. The first will consider the facts in light of the rules set out in *Coolidge*. The second will view the facts in light of the policy considerations sketched above for retaining the exclusionary rule.

Though the opinion of a vastly differing court, *Coolidge* can be said to stand for the principle that for the "plain view" exception to the warrant requirement of the Fourth Amendment to be operative two factors must be present: (1) the police officer must have had a prior justification for being where he was when the evidence was discovered; (2) the discovery of the evidence must have been inadvertent.

With these rules in mind, it is clear that the only issue here is whether there was the requisite prior justification in the facts described for the intrusion in the Thunderbird trunk by the officer. The mere fact that the record has shown that the officer who returned to the car had no knowledge or

suspicion of a crime having been committed renders the question of inadvertence academic. Initially, then, if we approach the question of "prior justification" from the negative (i.e., there was no prior justification), we are left to defend the anomalous conclusion that an officer knowing or believing with a high degree of certainty that a dangerous weapon is unaccounted for is not only going beyond the limts of the powers entrusted him, but also violating someone's constitutional rights when he takes action designed to insure that no harm will come from a dangerous weapon out of the control of the one authorized its use. And to those who would say that in this instance the requisite prior justification hinges on the probability of some harm resulting from the illegal capture of that revolver, we would respond with the obvious reminder that if the occasion of each and every crime could be predicted with absolute certainty we would have no case today.

However, in considering the aforementioned facts from the perspective of the rationale said to be the basis for the exclusionary rule, it will be assumed, as the Court of Appeals has found, that there was no prior justification for the intrusion into the automobile and, therefore, the evidence discovered must be suppressed. It is urged that from this perspective the exclusionary rule is exposed as being curiously inept at effecting the deterrent purported by the rule's advocates as justification for its existence.

First, it is established that the deterrence of unlawful activity by the police is an aim of the exclusionary rule. Thus, in *Weeks v. United States* (1914), 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, in which the suggestion of *Boyd v. United States,* supra, became law, the Court indulged two

assumptions: (1) that exclusion of evidence would discourage illegal behavior, and (2) that there was no feasible alternative for controlling such behavior. As the Court noted, at 232 U.S. 393:

> "* * * If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. * * *"

Similarly, in *Wolf v. Colorado* (1949), 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the Court commented, at 338 U.S. 44:

> "* * * Only by exclusion can we impress upon the zealous prosecutor that violation of the Constitution will do him no good. And only when that point is driven home can the prosecutor be expected to emphasize the importance of observing constitutional demands in his instructions to the police."

And in *Elkins v. United States* (1960), 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed. 2d 1669, the Court said, at 364 U.S. 217:

> "* * * Its [the exclusionary rule] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. * * *"

In *Tehan v. United States ex rel. Shott* (1966), 382 U.S. 406, 413, 86 S.Ct. 459, 15 L.Ed. 2d 453, the Court labeled deterrence the "single and distinct" purpose of the exclusionary rule. *Linkletter v. Walker* (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601, referred to the exclusionary

rule as "the only effective deterrent to lawless police action," at 636. And in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889, the Court, again speaking of the exclusionary rule, said, at 392 U.S. 12:

> "* * * Its major thrust is a deterrent one, * * * and experience has taught that it is the only effective deterrent to police misconduct in the criminal context * * *."

C. Failure of the rule.

Now the very interesting fact is, as Dallin H. Oaks so thoroughly establishes in *"Studying the Exclusionary Rule in Search and Seizure,"* University of Chicago Law Review (1970), Vol. 37, No. 4, that what very little empirical data there is on the deterrent effect is for the most part inconclusive, which leaves us to ponder what Mr. Chief Justice Warren was referring to when he said that "experience has taught" in the aforementioned quote from *Terry*. Indeed, Oaks' study goes to considerable lengths to point out that there has been virtually no empirical basis for the perpetuated assumption that the exclusion of evidence has or will deter the police from unlawful activity.

> "* * * The foregoing findings represent the largest fund of information yet assembled on the effect of the exclusionary rule, but they obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule. * * *" At 709.

Furthermore, Oaks points out a number of reasons why, notwithstanding the relative dearth of data, the exclusionary rule is not only inadequate to deter the police from mischievous behavior, but also fosters the effect of turning the criminal loose on society, which thereby becomes the only

one punished by the rule. Among them are the facts that the rule applies only in court, thus leaving police behavior unscrutinized when conviction is not sought; the fact that the police are ill-equipped, as are all but an illustrious few judges and legal scholars, to comprehend the overwhelming complexity of Fourth Amendment case law; that, further, there is no such communication between prosecutors and police as the aforecited quote from *Wolf v. Colorado* would seem to indicate; and that in only the very rare instance will the offending police officer be reprimanded should evidence he secured be suppressed.

And when we come to consider the exclusionary rule in light of the facts of the instant case, the result seems clear that, not unlike Dr. Frankenstein, the courts have become the victims of their own creation. For if we are to find, as the Court of Appeals found, that the police officer involved violated the defendant's constitutional rights and that, consequently, the evidence seized must be excluded, we have accomplished at most the application of another embellishment to an already baroque body of law. Perhaps this case will stand for the principle, should the ruling of the lower court be affirmed, that a police officer should act only when a crisis has arisen and must be restrained, at all costs to common sense and domestic tranquillity, from doing anything to avert that crisis from arising. If deterrence of unlawful police conduct is the aim of the exclusionary rule, we are strained to imagine how that purpose will be furthered by labeling reason "unreasonable," the protection of society "unconstitutional," and a murderer a free man. Certainly, the essential wisdom of the Fourth Amendment has not been corroded to the point of being little more than a shield for the criminal to defend himself from the well-intentioned endeavors of the police.

It must be pointed out, however, that the foregoing has not been designed to attack the alleged goal of deterring unlawful police conduct. Rather it has been designed to suggest the incapacity of the exclusionary rule alone to accomplish that goal and its potential for working an injustice on society by punishing no one, while letting the criminal free. The exclusionary rule is, furthermore, a curiosity of American jurisprudence and as such poses the question of why the exclusion of improperly obtained evidence is a necessary deterrent or vital to the preservation of judicial integrity when no such rule is recognized in other common-law jurisdictions such as England and Canada. The obvious suggestion, here put forth, is that it is not absolutely necessary, and if it is to be preserved, its application should be cautiously limited to only those instances where the alleged police misconduct can be shown to demonstrate a flagrant and deliberate disregard for one's Fourth Amendment rights.

D. Modification of the rule is justified.

The factual setting of the case at hand appears to be ready-made for the Court to use as a basic framework for limiting the exclusionary rule to situations where the balancing of interests will result in the protection of the individual constitutional rights under the Fourth Amendment while at the same time recognizing the interests of the public in the apprehension of criminals.

In the instant case the evidence from the Thunderbird automobile was obtained without benefit of a search warrant. It was obtained by a law enforcement officer with about six months of experience (A. 103). The evidence was obtained as a result of the officer's good-faith belief that a person in

custody, whom he was unable to communicate with at the time, probably had property in the unguarded vehicle which was parked outside of the garage which it was his duty to secure.

There is absolutely no evidence in the record that Officer Weiss was looking for evidence of any other crime and that his motivation was anything other than to secure the property of the person in custody.

Should it be determined that Officer Weiss's actions did in fact violate Dombrowski's Fourth Amendment rights, it is highly possible that all evidence subsequently discovered could be classed as fruit of the poisonous tree. Thus, the people again would be the losers and the exclusionary rule would not serve its purpose—the removal of incentive to violate the Fourth Amendment.

The same can be said for the alleged violation of Dombrowski's Fourth Amendment rights in the seizure of the bloodied mat and sock from the Dodge automobile by Mr. Mauer. The record is clear that Mauer understood that he was acting at the request of the sheriff in picking up significant pieces of evidence from the Dodge to be subjected to certain tests at the Crime Laboratory. He had been advised by the sheriff that a search warrant had been issued and still constituted authority for him to assist the sheriff. Although the record shows that the search warrant had not been returned, as the Court of Appeals determined, even if the warrant had been inadvertently returned prior to Mauer's acts in securing the evidence later used against Dombrowski, it would again be an inadvertent, unintentional act which should not be used against the people of the State to prevent

the conviction of a murderer. The exclusionary rule should not be applied where its application would not serve the avowed purpose of its adoption.

E. The rule should be applied to substantial, flagrant situations only.

The Fifth Circuit recently concluded that the exclusionary rule is not so inflexible that it cannot yield before the reasonableness of a search that is not quite covered by any of the traditional Fourth Amendment justifications. *United States v. Ragsdale* (5th Cir., 11/10/72), 12 Cr. L. 2218.

The first assumption in *Weeks,* that the exclusion of evidence would discourage illegal behavior, might have some validity if we limit the term "illegal" to *intentional, flagrant* violations of a person's Fourth Amendment rights. The problem that arises and which is so apparent from the facts in this case is that there can be unintentional, clearly innocent invasions of protected areas which are not discouraged by the exclusionary rule because the law enforcement officials involved do not know that their acts are illegal. The second *Weeks* assumption, that there is no feasible alternative for controlling such illegal behavior, ignores basic criminal law provisions covering misconduct of public officials such as sec. 946.12 (2), Wis. Stats., which provides for fine and imprisonment for any public officer or employe who does an act which he knows is in excess of his lawful authority.

In addition, civil actions may be brought against public officials for damages under the Civil Rights Act in federal court and under various provisions in state court proceedings.

In many situations the governmental agency employing the offender will be liable for the judgment as provided in sec. 270.58, Wis. Stats.

In his dissent in *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, Mr. Chief Justice Burger condemns the application of the exclusionary rule to vastly dissimilar cases as if they were the same. However, the Chief Justice would not abandon the suppression doctrine until some meaningful alternative can be developed.

We would suggest that while the Court can justifiably suggest that Congress legislate sufficient remedies to protect innocent persons who are sometimes the victims of illegal police conduct, such legislation is not necessary for the Court to reevaluate the exclusionary rule and redefine its application. It is respectfully suggested that the Court adopt the test similar to that proposed by the American Law Institute so that the exclusionary rule would apply only to a violation of constitutional rights which have been shown to be "substantial."

This proposed model code, set out in the appendix to the opinion of Mr. Chief Justice Burger, 91 S.Ct. 2019, provides as follows:

> "* * * In determining whether a violation is substantial the court shall consider all the circumstances, including:
>
> "(a) the importance of the particular interest violated;
>
> "(b) the extent of deviation from lawful conduct;
>
> "(c) the extent to which the violation was willful;

"(d) the extent to which privacy was invaded;

"(e) the extent to which exclusion will tend to prevent violations * * *;

"(f) whether, but for the violation, the things seized would have been discovered; and

"(g) the extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

Such a redefinition of the exclusionary rule would not disturb *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081, since the conduct sought to be controlled in *Mapp* was described as "official lawlessness and flagrant abuse" of the right to privacy, "unconscionable invasions of privacy," and "utter disregard of the enforceable Fourth Amendment"; it can unquestionably be concluded that such a violation would be classed as "substantial" under the suggested standard.

The conduct in *Mapp* is similar to that which occurred in other cases and engendered the following descriptions:

"flagrant disregard of the procedure which Congress has commanded"—*McNabb v. United States* (1943), 318 U.S. 332, 345, 63 S.Ct. 608, 87 L.Ed. 819.

"arbitrary intrusion"—*Wolf v. Colorado* (1949), 338 U.S. 25, 27-28, 69 S.Ct. 1359, 93 L.Ed. 1782.

"flagrantly, deliberately, and persistently violated the fundamental principles declared by the Fourth Amendment"—*Irvine v. California* (1954), 347 U.S. 128, 132, 74 S.Ct. 381, 98 L.Ed. 561.

"willful disobedience of a Constitution they are sworn to uphold"—*Elkins v. United States* (1960), 364 U.S. 206, 223, 80 S.Ct. 1437, 4 L.Ed. 2d 1669.

"arbitrary invasions by government officials"—*Camara v. Municipal Court* (1967), 387 U.S. 523, 528, 87 S.Ct. 1727, 18 L.Ed. 2d 930.

Contrast the above language with the language of the state trial court in its Memorandum Decision on Motions After Verdict (A. 73):

> "* * * In this Court's opinion, the conduct of the officer seems to be one of reasonableness, for he was not at the time of searching the automobile looking for any incriminating evidence, but was following what he termed to be a standard operating procedure in police work relative to safeguarding the property of Dombrowski."

Application of the same or similar standards as suggested in the American Law Institute proposal to the case at hand would demonstrate clearly that the actions taken by Officer Weiss and Crime Laboratory specialist Mauer did not constitute a substantial violation of Dombrowski's Fourth Amendment rights.

It would appear to be one testimony to the wisdom of our federalism that this Court has the power to diagnose whenever necessary and cure its own ills. When the time for judicial change is clearly recognized the Court can and will change. When subsequent events reveal the need the Court will remove or severely limit the binding power of a particular holding.

Prior to *Dombrowski v. Pfister* (1965), 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed. 2d 22, it had been a principle of long-standing that a federal court would not interefere with a state court's good-faith administration of the criminal

laws while or before that administration was in progress. The principle of comity was hailed as superceding any constitutional interest the federal court might have in a pending state criminal proceeding. However, *Dombrowski* appeared to many to provide an invitation for an aggrieved defendant to seek the ruling of a federal court as to the constitutionality of the law under which his prosecution was pending. The deluge began, the wisdom of the principle of comity threatened, and subsequently the Court acted in *Younger v. Harris* (1971), 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed. 2d 669, and a series of companion cases, to set down new guidelines for justifiable federal court interference with state criminal proceedings. Some courts, including the lower court in *Younger*, had concluded that *Dombrowski* had authorized federal courts to give equitable relief without regard to any showing of bad faith or harassment whenever a state statute was found on its face to be vague or overly broad in violation of the First Amendment. *Younger* reinstated the pre-*Dombrowski* rulings that irreparable injury usually established by bad faith and harassment must be shown to justify federal intervention.

The point of this all is to suggest an analogy between the Court's dealing with the abstention doctrine in *Younger* and its power to deal in this case with the exclusionary rule.

CONCLUSION

For the foregoing reasons petitioner submits that the lower court changed the trial court findings without such findings being "clearly erroneous" within the meaning of Rule 52 (a), Federal Rules of Civil Procedure, and further submits that the actions of Officer Weiss in recovering incriminating evidence of murder in the Thunderbird automobile and the actions of Crime Laboratory specialist Mauer

in recovering evidence from the Dodge automobile did not amount to unreasonable searches and seizures proscribed by the Fourth Amendment. In any event, the exclusionary rule should not be applied under the circumstances of this case. Petitioner urges that the judgment of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

ROBERT W. WARREN
Attorney General of Wisconsin

LE ROY L. DALTON
Assistant Attorney General of Wisconsin

Attorneys for Petitioner

Post Office Address:
114 East, State Capitol
Madison, Wisconsin 53702

January 23, 1973

CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on January 23, 1973), I duly mailed three copies of the Brief for Petitioner to each of the attorneys for the respondent, addressed as follows:

Mr. William J. Mulligan
108 West Wells Street
Milwaukee, Wisconsin 53203

Mr. David E. Leichtfuss
324 East Wisconsin Avenue
Milwaukee, Wisconsin 53203

LE ROY L. DALTON
Assistant Attorney General
of Wisconsin

Attorney for Petitioner